

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2781 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

VIHAJI SHIVAJI PARMAR

Versus

DY. DIST. DEVELOPMENT OFFICER, DIST. PANCHAYAT,
MEHSANA & OTHERS

Appearance:

MR CL SONI for Petitioner
MR HS MUNSHAW for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 05/05/97

C.A.V. JUDGEMENT

1. The petitioner by this petition challenges the action of the respondents of not making him permanent on the post of peon though he has been serving continuously since 1982 as well as the action of terminating the services of the petitioner for appointing a fresh hand without following the due procedure of law.

2. The facts of the case, in brief, are that the petitioner was appointed as a Rojamdari peon on 21st August, 1982, in the office of respondent No.2. The petitioner states that his appointment on daily wages was on a clear vacant post of peon which fall vacant because of the retirement of Shri Babubhai L. Gosai on 30th June, 1981. No appointment order admittedly has been given to the petitioner. Vide application dated 10th January, 1984, the petitioner made a request that he should be made permanent. The reply was given to this application by the respondent that as the post is to be filled in by calling the name from the employment exchange and as the daily wagers cannot be appointed on permanent basis, the petitioner's request cannot be accepted. The petitioner continued in service and he further made requests from time to time to make him permanent. The petitioner was again informed under the letter dated 25th May, 1988, that he cannot be made permanent on the post. Hence, this Special Civil Application by the petitioner before this Court.

3. The petitioner was protected by grant of interim relief, but it is no more in dispute now that the petitioner is not in service.

4. The contention of the learned counsel for the petitioner is that the petitioner was appointed on daily wages against the substantive permanent post and he worked thereon for more than five years, and as such, he acquired a right to be made permanent on the said post. It has further been stated that the respondents should have made him permanent and should have given to him all the benefits which are given to the regular employees. It has next been contended that the termination of services of the petitioner is bad in law.

5. On the other hand, the counsel for the respondents contended that the post of peon has to be filled in accordance with the Gujarat Panchayat Service (Classification and Recruitment) Rules, 1967. The post of peon has to be filled in by direct recruitment after selection. So the permanent post has to be filled in by making regular selection in accordance with statutory rules. There is no provision for regularisation of services of the daily wagers and to make them permanent on the post. The petitioner was only a daily wager, and as such, when he was involved in a criminal case though ultimately he may be acquitted, he was not allowed to work on the post on daily wages. He was involved in a criminal case under the Prohibition Act.

6. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

7. The post of peon was a permanent and substantive post on which the recruitment has to be made in accordance with statutory rules. The daily wager has no right to the post. It has been decided by the Hon'ble Supreme Court in the case of Madhya Pradesh Hasta Shilpa Vikas Nigam vs. Devendra Kumar Jain & Ors. reported in JT 1995 (1) SC 198 that the temporary Government servant has not acquired any right to hold the post. The temporary Government servant does not become permanent unless he acquires that capacity by force of any rule or is declared as permanent servant. The appointment of the petitioner as a daily wager was de hors of the rules. A copy of the rules has been filed along with the reply and it is clear that the appointment to the post of peon has to be made in the Panchayat after making the regular selection. The learned counsel for the petitioner has failed to point out any provision from the rules as well as any resolution or decision of the respondents which empower them to regularise the services of a daily wager on permanent post. It is a case where very specifically in the year 1984 then in the year 1988 the claim of the petitioner to make him permanent on the post was declined on the ground that there is no provision to make a daily wager permanent. So in case the plea of the petitioner is accepted then what this Court will do, it will provide a third mode of recruitment to the post of peon. So the judicial process will become a mode of recruitment. The appointment on regular basis after selection according to the rules is a condition precedent for the regularisation of the incumbents. The persons appointed as daily wagers de hors the rules even though they are regularly working for a long time are not entitled for regularisation. The petitioner's appointment on daily wages against the permanent post was a back-door entry and in case his claim for regularisation is accepted then what this Court will do, to give a premium to illegal appointment. Merely because the petitioner is continued as daily wager will not confirm him any right to hold the post. It only gives out that some of his godfather was there in the office of the respondent who managed for his initial appointment as daily wager and further his continuation in the service. When the permanent post was available, I fail to understand why the respondents have made the appointment on daily wages, more so, when the rules contemplate for the appointment by regular selection. These facts go to show that a favour has been extended to the petitioner by somebody sitting in the respondent and now the petitioner want to encash that favour to the

extent of claiming the permanency in the appointment dehors the rules. The regularisation of ad hoc appointees can be acquired only in accordance with the rules for direct appointment and the case of daily wagers cannot be on better footing. Reference may have to the decision of the Hon'ble Supreme Court in the case of Hindustan Shipyard Ltd. vs. Shambashiva Rao reported in 1996(7) SCC 499.

8. Reference may have to another decision of the Apex Court in the case of Union of India & Ors. vs. Bishamber Dutt reported in JT 1996 (10) SC 329 wherein the Court has held that the appointment not made on regular basis after selection according to the rules then there is no question of any direction to be given by the Court or the Tribunal for regularisation of such an employee. The Court in Para No.4 of the judgment has held:

The admitted position is that the respondent along with others came to be appointed on September 3, 1990, November 14, 1991 and September 14, 1994 as Class IV employees in the office of the Controller of Defence Accounts on part-time basis. There is a controversy as to whether they are appointed on hourly basis or on regular basis. The admitted position is that they were receiving the consolidated pay of Rs.500/- per month which was raised to Rs.600/- per month for working six hours a day. It is not necessary to consider the case whether it is full-time or hourly basis or monthly basis. Suffice it to state that they were not appointed to a regular post after selection according to rules; they were appointed as part-time employees de hors the rules. The question, therefore, is: whether they are entitled to the temporary status or regularisation as directed by the Tribunal? It is seen that pursuant to the enquiry whether temporary status should be granted to the part-time employees, directions were issued by the Ministry of Personnel, Public Grievances and Pension dated July 12, 1994 in the Memorandum, Clause 3, that they are entitled to such status. Since they are not appointed on regular basis in accordance with rules the direction issued by the Tribunal to regularise the service is obviously illegal. It is then contended by the learned counsel for the respondents that in view of the fact that they were regularly working for a long time they are entitled to regularisation. We do

not appreciate the stand taken on behalf of the respondents. Unless they are appointed on regular basis according to rules after consideration of the claims on merits, there is no question of regularisation of the services.

9. Reference may have to another decision of the Apex Court in the case of State of H.P. vs. Sureshkumar Verma and Anr. reported in 1996 (7) SCC 562. The Court has held that having made the rules for recruitment to various service under State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. Appointment on daily-wage basis is not an appointment to a post according to the Rules. The case before the Apex Court was that the respondents, therein, were engaged in a project and their services came to be terminated for want of work. On approach by the respondents to the High Court, the High Court had given the directions to the State to reengage them in any other work or appoint them against existing vacancies. Dealing with this matter the Apex Court has held that if such a course is adopted then the judicial process would become other mode of recruitment dehors the rules. Dealing with the contention of the respondents, therein, that the vacancies are available and therefore, the respondents are entitled to be continued in service, the Apex Court has held:

4. Mr. Mahabir Singh, learned counsel for the respondents, contended that there was an admission in the counter-affidavit filed in the High court that there were vacancies and that, therefore, the respondents are entitled to be continued in service. We do not agree with the contention. The vacancies require to be filled up in accordance with the Rules and all the candidates who would otherwise be eligible are entitled to apply for when recruitment is made and seek consideration of their claims on merit according to the Rules for direct recruitment along with all the eligible candidates. The appointment on daily wages cannot be a conduit pipe for regular appointments which would be a back-door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. It is equally settled law that even for Class IV employees recruitment according to Rules is a precondition. Only work-charged employees who perform the duties of transitory

nature are appointed not to a post but are required to perform the work of transitory and urgent nature so long as the work exists. One temporary employee cannot be replaced by another temporary employee.

The present is a case, which is exactly of the same nature which was there before the Apex Court. The regular vacancy was available and the same has to be filled in accordance with the recruitment rules, but the petitioner has been given the appointment on daily wages and now he is claiming the permanent appointment. So as observed by the Apex Court, if such a plea is accepted, then the appointment on daily wages would be a conduit pipe for regular appointment which would be a back-door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. It is a Class IV post, no doubt, but as stated by the Apex court that even for Class IV employees recruitment according to Rules is a precondition. So the claim of the petitioner to make him permanent is devoid of any substance and cannot be accepted.

10. Apart from this, the petitioner has no legal right to the post and in case his services were terminated as he was involved in a criminal case under the Prohibition act, no exception could be taken to the same. However, the petitioner has been acquitted what the counsel for the petitioner contended and the post is still lying vacant. The Class IV post has not been filled up in accordance with the recruitment rules. So the learned counsel for the petitioner is right to contend that as and when the selection is made on the post, the petitioner may be given an opportunity to apply and take the chance in selection. The only apprehension of the counsel for the petitioner is that the petitioner has now become over-aged and he may not be called for in selection as being barred by age. This apprehension is well-founded, but as in many cases, the Hon'ble Supreme Court has directed, the same course is adopted and it is hereby ordered that as and when the selection is made on the Class IV post lying vacant in the office of respondent, the petitioner's application may not be rejected only on the ground of barred by age. He may be considered to be within age limit. It is further ordered that the said post if it is not filled in so far then it may not be filled in by daily wage appointment or ad hoc or temporary appointment. The post has to be filled in only in accordance with the Rules after making regular selection. This Special Civil Application is dismissed. Rule is discharged subject to the aforesaid observations

and directions.

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